85-455

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85 --

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

POLO FASHIONS, INC.,

Petitioner

-vs-

STOCK BUYERS INTERNATIONAL, INC.,
COLUMBUS BUSINESS SYSTEMS, INC.,
EUGENE SERGIO
and MORTON LADOWITZ,

Respondents.

RESPONDENTS' MOTION TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Counsel for Respondents

RESPONDENTS' MOTION TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Rule 16, Respondents hereby move this Honorable Court for an Order dismissing the Petition for Writ of Certiorari as this Court lacks subject matter jurisdiction to review a criminal conviction obtained in the absence of any representation of the United States of America by the United States Attorney General or other authorized representative. The grounds for this Motion are fully set forth in the accompanying Memorandum in Support.

Respectfully submitted,

Carl Genberg
Counsel for Respondents

PARTIES TO THE PROCEEDINGS

Neither Columbus Business Systems, Inc. nor Stock Buyers International Inc. has any parent companies or subsidiaries.

MEMORANDUM IN SUPPORT

Respondents were convicted of criminal contempt pursuant to 18 U.S.C. Section 402. This conviction was obtained not by the United States Attorney's office but by Petitioner's private counsel who volunteered their services to act as prosecutors in this matter. Throughout the proceedings in the district court and the court of appeals, Petitioner's counsel has argued the Rule 42(b) Fed.R.Crim.P. authorizes district courts to appoint private counsel not only to give notice of a criminal contempt but to *prosecute* the alleged contemnors as well.

Respondents respectfully submit that: Criminal contempt is an offense against the United States;*United States v. Williams*, 522 F.2d 830,836,839 *en banc*(5th Cir. 1980); All offenses against the United States must be prosecuted by the United States Attorney General or his assistants unless "otherwise provided by law." 28 U.S.C. Section 547; Rule 42(b) of the Fed.R.Crim.P. is merely a rule of procedure and was not intended by Congress to vest in the District Courts the power to appoint special prosecutors in cases of criminal contempt; Rule 42(b) of the Fed.R.Crim.P. by its express language only authorizes a district court to appoint counsel for the purpose of giving notice to the alleged contemnors of the criminal proceeding; The power to appoint inferior officers of the executive branch is of

constitutional dimensions. Art.II, Sec 2, Cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed 2d 659, 96 SCt 612 (1976); and as the District Court lacked power to appoint Petitioner's private counsel as special prosecutors and in the absence of any participation in the criminal trial of a representative of the United States, the entire proceedings in the district court and the court of appeals must be held a legal nullity and the Petition dismissed. *In re Lahm Industries, Inc.*, 609 F.2d 567 (1st Cir. 1979).

CONCLUSION

For all of the above reasons, Polo Fashions, Inc.'s Petition should be dismissed.

Respectfully Submitted,

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18 November 1985